Nova Law Review

Volume 16, *Issue* 1 1991 *Article* 18

St. Johns County v. Northeast Florida Builders Association and Florida School Impact Fees: An Exercise in Semantics

Joseph Livio Parisi*

*

St. Johns County v. Northeast Florida Builders Association and Florida School Impact Fees: An Exercise in Semantics*

TABLE OF CONTENTS

I. INTRODUCTION

Beautiful beaches and the tropical climate of Florida have lured many new residents to this paradise over the past two decades.[1] Esti-

* The author expresses his gratitude to the firms of Akerman, Senterfitt & Eidson and Michael M. McMahon and Gregory J. Kelly, Esqs. for the case briefs and essential reports and for providing an understanding of underlying concepts.

1. The Department of Commerce, Bureau of the Census, estimated the projected population growth to be highest from 1988 to 2000 in the following states:

State	% Population Growth
Arizona	23.1
Nevada	21.1
New Mexico	20.6
Florida	20.3
Georgia	19.4
Alaska	19.3

Although Florida is not the highest in percentage of population growth among the states, the raw numbers of population increases in Florida effect county operations.

This comment is centered around St. Johns County, Florida. The Bureau of the Census has estimated the population change in St. Johns County to be:

1960 (Census)	1970 (Census)	1980 (Census)	1989 (Est.)
30,034	31,035	51,303	84,389

mates for the year 2000 indicate no relief for Florida, with a projected increase of 2,639,000 people.[2] State taxes, bonds and funds[3] have supported infrastructure improvements necessitated by such population growth in the past. However, regulations and impact fees[4] are tools of the present,[5] used to shift the cost of these improvements to those who

---

%3.3* %65.3* %64.5*

* Percent change in population between the represented years.

2. Calculated from the percentage estimates of the United States Bureau of the Census.

3.

> (1) The district school fund shall consist of funds derived from the district school tax levy; state appropriations; appropriations by county commissioners; local, state, and federal school food service funds; any and all other sources for school purposes; national forest trust funds and other federal sources; and gifts and other sources.

St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 641 (Fla. 1991) (quoting FLA. STAT. § 236.24(1) (1989)).

4. Impact fees are defined as:

> [The] charges or fees levied by a governmental unit against new development for the purpose of acquiring or recovering some or all of the cost of providing the public infrastructure facilities needed to support the new growth or development paying the fees. They are variously referred to as impact fees, capital recovery fees, capital contributions, development share charges, municipal utilities system charges, *access fees*, and a host of other aliases. The name is never important. The fees are defined, as a practical matter, by their purpose and effect.
>
> . . . .
>
> . . . [The] fee system is devised . . . [to require] each unit of growth or development to pay its pro-rata share of the cost of providing the public works facilities necessary to support the new development. Any fee structure designed to accomplish this specific purpose is an impact fee.

E. Allen Taylor, Jr., *How to Develop and Use Impact Fees Successfully*, 1988 INST. ON PLAN., ZONING, & EMINENT DOMAIN § 11.02 (emphasis added); *see also* Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 417 (1981) (Impact fees are defined as "charges levied by local governments against new development *in order to generate revenue for capital funding* necessitated by the new development.") (emphasis added).

5. *See, e.g.*, Eager v. Florida Builders Ass'n. v. Florida Keys Aqueduct Auth., 580 So. 2d 771 (Fla. 3d Dist. Ct. App. 1991) (system development fees were charged for both "new and existing customers who modify, add or construct facilities which impose a potential demand on the water system"); City of Hallandale v. ACMAR Eng'g Corp., 560 So. 2d 802 (Fla. 4th Dist. Ct. App. 1990) (holding "that a building permit does not provide a developer with a vested right to avoid [a] later enacted [impact or reserve capacity] fee"); Babcock Co. v. State, Land & Water Adjudicatory

created their demand—developers[6] trying to accommodate new residents.

The issues in *St. Johns County v. Northeast Florida Builders Ass'n*,[7] are centered around the constitutional validity of the St. Johns County Educational Impact Fee Ordinance.[8] In 1986, the St. Johns County School Board requested that educational facilities be included in the county's impact fee program.[9] Thereafter, the Educational Impact Fee Ordinance was designed to generate revenue from developers, and in turn from residents, who "may reasonably be expected to place students in the public schools of St. Johns County . . . ."[10] The ordinance stated that the funds collected were to be used to "construct, expand and equip the educational sites and educational capital facilities necessitated by new development."[11] This revenue generated from the impact fee would be placed in a special trust fund to defray the costs of

---

Comm'n, 558 So. 2d 76 (Fla. 1st Dist. Ct. App. 1990) (transportation impact fees); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d Dist. Ct. App. 1989) (holding constitutional rights of the developer were not violated by the assessment of "developmental impact fees" for sewer, solid waste and traffic control); City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th Dist. Ct. App. 1988) (holding municipal ordinance exempting properties in municipality from county road impact fee was invalid). *See generally* Jerome G. Rose, *Development Fees-To What Extent May Municipalities Shift the Costs of Public Improvements to New Developments*, 16 REAL EST. L.J. 356 (1988).

6. "It is a person's status (as the developer of dwelling units that require additional public facilities capacity) that triggers the requirement to pay impact fees . . . ." Petitioners' Initial Brief at 14, St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (No. 75,986) [hereinafter Petitioners' Brief].

7. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991).

8. St. Johns County, Fla., Ordinance 87-60 (Oct. 20, 1987).

9. Petitioners' Brief, *supra* note 6, at 4.

10. This ordinance provided that either the developer or residents can be feepayers because the ordinance defines a feepayer as "a person commencing a land development activity which *may reasonably be expected to place students in the public schools of St. Johns County* and which requires the issuance of a building permit for a residential building or structure or permit for residential mobile home installation." St. Johns County, Fla., Ordinance 87-60 § 5(A) (Oct. 20, 1987) (emphasis added). In addition, section 8(A) states: "The person applying for the issuance of a building permit for accessory structures, *additions to and remodeling of existing structures*, . . . *shall pay the fee* . . . ." St. Johns County, Fla., Ordinance 87-60 § 8(A) (Oct. 20, 1987) (emphasis added)(the ordinance does not differentiate between whether the developers or resident homeowners pay the fee).

11. *St. Johns County*, 583 So. 2d at 637 (citing St. Johns County, Fla., Ordinance 87-60 § 10(B) (Oct. 20, 1987)).

increasing educational facility capacity needed to support the additional students.[12] All funds collected that were not expended within a six year period would be refunded to the property's current landowner.[13]

In June of 1988, the Northeast Florida Builders Association brought suit to declare the St. Johns County Educational Impact Fee ordinance unconstitutional.[14] In April of 1990, the Fifth District Court of Appeal affirmed the lower court's decision that the ordinance was unconstitutional.[15] Judge Harris, speaking for the majority of the Fifth District, stated that the ordinance "violate[d] the free public school provision, because as enacted, the impact fee [was] nothing more than a *user fee*."[16] The court then certified the issue of new development funding of new school construction to the Florida Supreme Court.[17] Subsequently, in August of 1991, the Florida Supreme Court, in reversing the Fifth District, decided that the St. Johns County Educational Impact Fee Ordinance for new school facility construction did not violate the "constitutional mandate for free public schools."[18]

The certified question, insufficiently answered by the Florida Supreme Court and addressed by this comment, was whether impact fees, levied for the construction of new school facilities, were a form of constitutional regulatory device or just another twist on taxation?[19] This comment advocates that the Florida Supreme Court did not sufficiently analyze the problems posed by this question. Rather, the court semanti-

---

12. St. Johns County, Fla., Ordinance 87-60 § 9 (Oct. 20, 1987).

13. *Id.*, § 11(B).

14. Petitioners' Brief, *supra* note 6, at 1 (motions for summary judgment were filed and the appeal decided in favor of the Northeast Florida Builders Association).

15. St. Johns County v. Notheast Fla. Builders Ass'n, 559 So. 2d 363, 363-64 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (1991).

16. *Id.* at 363 (emphasis added).

17. *Id.*

18. The question certified to the Florida Supreme Court as one of great public importance was: "[W]hether St. Johns County could impose an impact fee on new residential construction to be used for new school facilities." *St. Johns County*, 583 So. 2d at 636 (emphasis added). The supreme court determined that the "ordinance did not create an unlawful delegation of power," and upheld the validity of the ordinance subject to the removal of section 7(b) and a county-wide agreement to the ordinance. *Id.* at 639-42.

19. This question is asked by many authors reviewing the constitutionality of impact fees in general. *See, e.g.*, Juergensmeyer & Blake, *supra* note 4, at 422-27; John M. Payne, *Housing Impact Fees*, 20 REAL EST. L.J. 75 (1991); Rose, *supra* note 5, at 358-59; Taylor, *supra* note 4, at § 11.04(1).

cally manipulated the language of a newly accepted method of raising revenue to cope with other services[20] in order to accommodate new school facility construction.

This comment is divided into four parts. First, part I is a discussion of relevant case history on impact fees and their effect on the Florida Supreme Court's decision in *St. Johns County*.[21] Part II then addresses some of the constitutional challenges presented by this case. The principal argument is that the St. Johns County Educational Impact Fee is an unconstitutional tax masqueraded as a land use regulation, and therefore, that it violates the constitutional mandate for a "uniform system of free public schools."[22] In particular, part II argues that the removal of section 7(B)[23] from the St. Johns County Ordinance[24] will not, in and of itself[25], cure the constitutional defects[26] ad-

---

20. Examples of service increases are the expansion for sewer and waste disposal, roads, emergency medical services, police and fire protection. *See generally* Juergensmeyer & Blake, *supra* note 4, at 417.

21. *St. Johns County*, 583 So. 2d 635.

22. "Section 1. System of public education. - Adequate provision shall be made by law for a uniform system of free public schools and for the *establishment*, maintenance and operation of institutions of higher learning and other public education programs that the *needs of the people may require*." FLA. CONST. art. IX, § 1 (emphasis added).

23. Section seven titled, "Computation of the Amount of Educational Facilities Impact Fee" states in part:

> B. If a feepayer opts not to have the impact fee determined according to paragraph (A) of this section, then the feepayer shall prepare and submit to the St. Johns County School Board an independent fee calculation study for the land development activity for which a building permit or permit for mobile home installation is sought. The student generation and/or educational impact documentation submitted shall show the basis upon which the independent fee calculation was made. The St. Johns County School Board may adjust the educational facilities impact fee to that deemed to be appropriate given the documentation submitted by the feepayer. The County Administrator shall make the appropriate modification upon notice of such adjustment from the School Board.

St. Johns County, Fla., Ordinance 87-60 § 7(B) (October 20, 1987).

24. *Id.*

25. In addition to section 7(B), sections 7(A)(5), (A)(6) and 5(D) offer a similar constitutional defect; they resemble a user fee:

> (A)(5) If the type of development activity that a building permit is applied for is not specified on the above fee schedules, the County Administrator shall use the fee applicable to the most nearly comparable type of land use on the above fee schedules. The County Administrator shall be guided in the selection of a comparable type by information provided by

dressed by the Fifth District Court of Appeal.[27] Part III deals with the need for adopting a "less intrusive alternative means"[28] component to the "dual rational nexus test"[29] used by the Florida Supreme Court to evaluate this impact fee. Part IV reviews and analyzes the St. Johns County Ordinance[30] with special attention to the test adopted and ap-

---

> the School Board of St. Johns County. If the County Administrator determines that there is no comparable type of land use on the above fee schedule then the County Administrator shall request a determination by the School Board of the appropriate fee.
>
> (A)(6) In the case of change of use, redevelopment, or expansion or modification of an existing use which requires the issuance of a building permit or permit for mobile home installation, the impact fee shall be based upon the net positive increase in the impact fee for the new use as compared to the previous use. The Count Administrator shall be guided in this determination by student generation statistics provided by the St. Johns County School Board.
>
> (5)(D) "Land Development Activity Which May Reasonably Be Expected To Place Students in the Public Schools of St. Johns County" means any change in land use or any construction or installation of residential buildings or structures or *any change in the use of any structure that will result in additional students in the public schools* of St. Johns County.

St. Johns County, Fla., Ordinance 87-60, §§ 7(A)(5), 7(A)(6), 5(D) (October 20, 1987) (emphasis added).

26. *See supra* note 10.

27. *St. Johns County*, 559 So. 2d at 364.

28. *See* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139 (Winter 1987).

29. *St. Johns County*, 583 So. 2d at 637.

30. The ordinance reads as follows:

> An ordinance relating to the regulation of the use and development of land in St. Johns County, Florida; imposing an impact fee on land development in St. Johns County for providing new schools and related facilities necessitated by such new development; stating the authority for adoption of the ordinance; providing definitions; providing findings and declarations of the board of county commissioners; providing for the payment and time of payment of an educational facilities impact fee; providing a method of payment of the fee; providing for the remittal of fees collected and their expenditure by the school board of St. Johns County for educational capital purposes; providing for refund of unexpended funds; providing for exemptions and credits; providing for severability; providing for penalties; providing an effective date.

St. Johns County, Fla., Ordinance 87-60 (October 20, 1987) (preamble) (titled as the Educational Facilities Impact Fee Ordinance).

plied by the court, the effect of footnote six[31] on the constitutional validity of the ordinance and the effect this ordinance will have on other counties throughout the state.[32]

II. FLORIDA IMPACT FEES

Based on recent Bureau of Census reports, Florida municipalities have felt the effect of population increases in many areas of land development. Florida courts have already addressed the needs of growing communities for the funding of additional infrastructures such as water and sewer systems,[33] roads,[34] parks[35] and other recreational facilities, through impact fees. However, the imposition of an impact fee via a county ordinance, for the explicit use of constructing new school facili-

---

31. *St. Johns County*, 583 So. 2d at 640 n.6. The court in this footnote suggests that age limitations or restrictions entered into by a mutual covenant, as exhibited by the condominium owners in White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 350 (Fla. 1979) (where age limitations were for minors under the age of twelve), would not undermine the position taken by the court. *Cf. St. Johns County*, 583 So. 2d at 640.

The Florida Supreme Court's position in their objection to section 7(B) of the St. Johns County Educational Impact Fee Ordinance was that it "permits households that do not contain public school children to avoid paying the fee . . . [and would] have the potential of being user fees . . . thereby colliding with the constitutional requirement of free public schools." *Id.* It is difficult, if not impossible, to harmonize this position with the position of the court in footnote six. The only distinction between the court's previous position in objecting to the section 7(B) adult retirement facilities exemption, and the one mentioned in footnote six, is the unchangeable future position of the residence agreement to the land use restriction; i.e., a school child can not later occupy this residence which is subject to the land use restriction. However, these distinctions only strengthen the position that the impact fees are simply user fees directed "primarily [at] those households that *do* contain public school children . . . ." *Id.* (emphasis added).

32. Based on figures from the United States Bureau of the Census, counties such as Osceola with a 98% increase estimated for the period from 1980 to 1989, and other counties with large population percentage changes, will be effected by this decision.

33. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979); *see also* City of Tarpon Springs v. Tarpon Springs Arcade Ltd., 585 So. 2d 324 (Fla. 2d Dist. Ct. App. 1991).

34. *See* Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983), *review denied*, 451 So. 2d 848 (Fla. 1984); *see also* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975).

35. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th Dist. Ct. App.), *petition denied*, 440 So. 2d 352 (Fla. 1983).

ties, is an issue of first impression[36] in Florida.

Impact fees have gained acceptance in Florida because of their ability to shift the cost of public service improvements and new construction from the municipality to the developer.[37] The intended purpose of many impact fees is to achieve a perfect society, where all its citizenry are paying their "fair share"[38] of public services used as calculated by some type of "magic meter."[39] Obviously, use of such a

---

36. *St. Johns County*, 583 So. 2d at 638.

Although municipality designed impact fees are new to the South, the first impact fee was a 1957 New Jersey fee imposed for new school facility construction. Taylor, *supra* note 4, at § 11.03. Albeit the court in Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957), decided the invalidity of the impact fee on grounds that assistance for increased municipality population "must come not from the municipality nor from the courts but from legislature[;]" its ironic that this comment is also based on an impact fee for new school facility construction and the competing philosophies behind who should bear the burden of increased facility costs. *Id.* at 268.

37. Although the county's intent has been characterized as shifting the economic burden from the municipality to the developer, in actuality, the cost is passed through to the intended user. This actual intent of the ordinance is evident by the underlying meaning of sections 5(D) (where only those additions are charged which would change the *land use by generating additional students in public school*), 7(A)(6) (where impact fees for modification of existing structures "shall be based upon the net positive increase in the impact fee for the *new use as compared to the previous use*") and 11(B) (which shows an understanding that the impact fee was passed on to the purchase price of the home and should be refunded to the then "current landowner"). St. Johns County, Fla., Ordinance 87-60, §§ 5(D), 7(A)(6), 11(B) (Oct. 20 1987) (emphasis added); *see, e.g., Dunedin*, 329 So. 2d at 321 (The court stated "[t]he cost of new facilities should be borne by *new users* . . . .") (emphasis added).

38. "Fair Share" can best be explained by the name given to the Palm Beach County Ordinance for road improvements: Fair Share Contribution for Road Improvements Ordinance. *See* Palm Beach County Ordinance 79-7 (1980); *cf. St. Johns County*, 583 So. 2d at 640 (where the intended purpose of the St. Johns County Ordinance is "to regulate the use and development of land so as to assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide public educational sites and facilities in St. Johns County.").

39. The term "magic meter," put forth by counsel for the Builders, is an important concept in understanding the underlying theory of impact fees. In the area of public services, the ideal situation would be the ability of having a "magic meter" calculating the amount of services used by each member of the community. For example, if every time you ran your car on a public road the "magic meter" began to tic off usage time, the county could accurately assess a person's road usage and send them a bill. If every time a person flushed their toilet the meter ran on their usage of the sewage system, they could then be assessed a pro rata share of the cost. Interview with Michael McMahon, Counsel for the Builders in St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (July 29, 1991).

meter is impossible. However, this is exactly what impact fees are designed to model—the perfect fee assessment.

The purpose of the St. Johns County ordinance parallels a model impact fee by attempting to distribute the cost of increasing the capacity of school facilities to those who have created their need.[40] Although this is a politically laudable gesture by the county, the developers contend that it is at odds with the Florida constitutional mandate for public free schools[41] and is therefore inconsistent with the county's power to raise revenue.[42]

The Fourth District Court of Appeal in *Home Builders & Contractors Ass'n v. Board of County Commissioners*,[43] has credited Florida home rule powers[44] as offering adequate authority for county governing bodies to implement impact fees. In fact, many counties throughout Florida have now designed ordinances or regulations to levy impact fees on developers.[45] This article focuses primarily on the St. Johns County Educational Impact Fee Ordinance 87-60 as an example of these impact fees.

The main assertion in opposition to the constitutionality of the St. Johns County Educational Impact Fee Ordinance was that it bears a keen resemblance to a user fee.[46] The principal case relied on by the

---

40. Previous impact fees have been predicated on direct ties between the need and demand created by new growth. *See* Rose, *supra* note 5, at 356.

41. *See* FLA. CONST. art. IX, § 1; *see also* Scavella v. School Bd., 363 So. 2d 1095 (Fla. 1978).

42. *St. Johns County*, 583 So. 2d at 641.

43. Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983).

44. FLA. STAT. § 125.01(1) (Supp. 1990).

Home rule power is the power vested in cities and towns as "an inherent right of local self-government" which is supported by the local government's ability to best protect their own needs. 1 MCQUILLIN MUN. CORP. §§ 1.40, .42 (3d ed. 1987). Although the is no clear distinction between state and local activity, the effect of rapidly increasing local populations necessitates the need for increased local control, because any "appropriate regulation . . . varies in accordance with the density, geographical location, physical conditions, the needs and conveniences to be furnished and the means to secure them, and the standards of the inhabitants as well." *Id.*, § 1.64. Accordingly, local government's right of home rule power may be the best manner for serving the people of that particular region.

45. *E.g.*, Palm Beach County Ordinance 79-7 (1980) (Fair Share Contribution for Road Improvements Ordinance); *see* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 607 (Fla. 4th Dist. Ct. App. 1983) (development of county level parks).

46. A user fee is defined as "[c]harges imposed on persons for the use of a particular facility." BLACK'S LAW DICTIONARY 1543 (6th ed. 1990).

Florida Supreme Court was *Contractors & Builders Ass'n v. City of Dunedin*,[47] which stands for the proposition that funds collected by impact fees must be "limited to meeting the costs of expansion."[48] Although correctly cited for this proposition, the case stands for a much larger principle; there is "nothing wrong with transferring to the new user of a municipality [service] a fair share of the [additional] costs [increased capacity] of the system involves."[49] This principle is the common thread that weaves through all of the cases involving impact fees, complicating the distinction between "impact fee" and "user fee."

As a user fee, even the county would have to agree with the Fifth District Court of Appeal that the fee violated the free public school mandate.[50] However, the county identifies the Educational Facilities Ordinance as a "development exaction"[51] and not a "user fee," with the distinction that the fee is for increasing facility capacity, not actual use.[52] The reality is that developers of new residential areas are being charged an additional fee,[53] apart from the future payment of ad valorem taxes.[54] The distinction should not lie in whether one is being charged for the use of a facility or the expansion of the facility's capacity.[55] Rather, it should be determined by a test applicable to the specific parameters of the needed services created by the new development.

The Fourth District Court of Appeal in *Broward County v. Janis Development Corp.*[56] set the stage for the development of impact fee

---

47. 329 So. 2d 314.

48. *St. Johns County*, 583 So. 2d at 637 (citing *Dunedin*, 329 So. 2d at 320).

49. *Dunedin*, 329 So. 2d at 317-18.

50. *St. Johns County*, 559 So. 2d at 363.

51. Petitioners' Brief, *supra* note 6, at 17.

52. *Id.* at 18.

53. Assuming that the impact fee is initially charged to the developer will, by the very nature that "subdividing is a profit-making enterprise," be passed onto the homebuyers. *See* Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 868 (Fla. 3d Dist. Ct. App. 1976).

54. Ad valorem taxes can be defined as "[a] tax levied on property or an article of commerce in proportion to its value, as determined by assessment or appraisal." *See* BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

55. The impact fees for roads, schools, public buildings, police, fire, emergency medical services, and parks estimated in the Methodology Study, are the totals for each specific structural unit. These fees represent a proportional share of the cost to provide additional facilities. *See* St. Johns County Impact Fee Methodology, prepared by Dr. J. Nicholas (Dr. J. Nicholas was the county consultant developing these impact fees.) [hereinafter Methodology Study].

56. Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975).

parameters. In *Janis Development*, the court rejected an impact fee for road construction because the "fee was simply an exaction of money to be put in trust for roads, which must be paid before developers may build" without stipulating the use for which the funds are collected.[57] This same court later, in *Palm Beach County*,[58] affirmed the validity of an impact fee ordinance for road improvements, recognizing that the ordinance followed the lessons expressed by the court in *Dunedin*[59] regarding the defects in the *Janis Development*[60] ordinance. The Fourth District Court stated that a proper impact fee is a fee that assures the cost of the improvements will exceed the funds collected, and that those funds will be used to benefit the new development.[61] However, the Florida Supreme Court is now faced not with road improvements or water and sewer connections, but new school facilities.

In the area of education, the generation of funds for new school facilities should come from the populace as a whole, because in actuality it is the populace as a whole which will benefit. However, the St. Johns ordinance divides the paying population into two constituents: first, the residents of the new development; and second, only the residences that would "reasonably" require the service.[62] Under previous fee adjudications, the theory of having the new user pay a "fair share

---

57. *Id.* at 375.

58. *Palm Beach County*, 446 So. 2d at 145.

59. 329 So. 2d at 320-21.

60. *Id.* at 318.

61. *Palm Beach County*, 446 So. 2d at 145.

62. *See, e.g.*, St. Johns County, Fla., Ordinance 87-60 § 5(D) (Oct. 20 1987) (where the ordinance defines some land development activity under the criteria of whether "that [development] will result in additional students in the public schools.").

In addition, in the City of Tarpon Springs v. Tarpon Springs Arcade Ltd., 585 So. 2d 324, the Second District Court of Appeal is now considering under a Water and Sewer Impact Fee, the problems that arise because "the ordinance fails to direct the building official as to the method and manner in which credits are to be allowed or applied in determining whether there is or is not a fee due for the new or expanded use of a remodeled structure . . . ." *Id.* at 326-27. It is quite possible that if section 5(D) of the St. Johns County ordinance was permitted to remain, problems would arise in determining what constitutes the meaning of what "will result in additional students in the public schools," as well as being violative as a direct user fee.

It is this author's opinion that section 5(D) is as detrimental to the validity of the ordinance as the court feels 7(B) is, where "impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools." *St. Johns County*, 583 So. 2d at 640.

of the costs which new use of the system involves,"[63] was appropriate. However, this is not the case where school facilities are concerned. Impact fees for educational facilities are different from all others because of Florida's constitutional mandate for a "uniform system of free public schools,"[64] and the scope of the proposed infrastructure project.[65]

III. CONSTITUTIONAL LEGITIMACY OF ORDINANCE 87-60

The main constitutional challenge presented by the St. Johns County Educational Facilities Impact Fee Ordinance[66] is whether it violates the mandate for a "uniform system of *free public schools*."[67] The application of this ordinance, irrespective of the language in which it is couched,[68] is violative of the constitutional mandate for a uniform system of free public schools. There is virtually no difference, except semantically, between access to public schools being dependent upon the payment of tuition, or the payment of a fee prior to all construction that would place a student in the public school.[69] The basis for this

---

63. *Dunedin*, 329 So. 2d at 318.

64. FLA. CONST. art. IX, § 1; *cf.* Juergensmeyer & Blake, *supra* note 4, at 440 (stating "[a]lthough *a distinction could be made between sewer and water facilities and education* . . . all are necessary services normally provided by local governments.") (citation omitted) (emphasis added).

65. It is a fundamental premise that, as municipalities grow, there is a continual need for the new public improvements as well as for maintenance and expansion of existing infrastructure and public facilities. Local jurisdictions have traditionally been responsible for the provision of major infrastructure improvements such as roads, schools, parks, sewage, and drainage facilities. Financing of these improvements has come from general revenues, most notably the real property tax, and through issuance of general obligation bonds which are repaid from local property tax revenues.

Delaney et al., *supra* note 28, at 140.

66. St. Johns County, Fla., Ordinance 87-60 § 2(A) (Oct. 20, 1987) (the ordinance shall be known and may be cited as the "St. Johns County Educational Facilities Impact Fee Ordinance").

67. FLA. CONST. art. IX, § 1 (emphasis added).

68. Justice Harris of the Fifth District Court of Appeal stated that even though the ordinance is "couched in the broad language of an impact fee, it is ultimately assessed only against those households that have children in public school." St. Johns County v. Northeast Fla. Builders Ass'n, Inc., 559 So. 2d 363, 364 n.2 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (Fla. 1991) (where in footnote two, Justice Harris offered his objection to section 7(B), listing examples such as *retirement homes*, nursing homes and families with children in private schools).

69. *Cf. St. Johns County*, 583 So. 2d at 639.

constitutional challenge is created by the interpretation given to the meaning of "free public schools."

The concerted understanding is that "free" was intended to mean that a child will not be prevented from attending a public school because his or her tuition had not been paid.[70] The line between paying for a present use and paying for a future use is thin, and should not be the justification for determining that the impact fee is not a user fee. A question posed by this interpretation is: How far from the schoolhouse door is the county permitted to charge a fee?[71] One conceivable answer to this question is determined by how far removed payment of the fee is from being attributed to the homeowner. From this answer it is arduous to offer opposition to Justice Harris' logical conclusion in the Fifth District Court's decision that: "Whether the money is paid directly to the school board as tuition or to the county commission and delivered to the school board when the family of public school children build or buy [or remodel] a home in the district seems to have little practical distinction."[72] Although the Florida Supreme Court stated that "St. Johns County [had] initiated a comprehensive study of whether to impose impact fees to finance additional infrastructure,"[73] the methodology study examined by the court only appraised one method of meeting the needed increase in facility capacity, impact fees, and did not address other "alternative financing mechanisms."[74]

A facilities task force was appointed by the Commissioner of Education in 1989 to examine the projected education capital outlay needs for Florida up to the year 2000.[75] Specifically outlined was the possibil-

---

70. Although counsel for the county states this is not the effect of the ordinance, because "[t]he parent [will be] in the 'pokey' but the child will be in school at no charge," counsel for the Homebuilders' believes "imprisonment of a parent is a price no child should have to pay." Petitioners' Brief, *supra* note 6, at 21; Answer Brief of Respondents at 24, *St. Johns County*, 583 So. 2d 635 (Fla. 1991) (No. 75,986) [hereinafter Respondents' Brief].

71. This is one of the many questions raised while discussing the case with Mr. McMahon. Interview with Michael P. McMahon, Counsel for the Builders in St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (July 29, 1991).

72. *St. Johns County*, 559 So. 2d at 365.

73. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 637 (Fla. 1991).

74. Facilities Task Force, *A Report to the Commissioner*, at 7 (February 1990) (available at the office of Commissioner of Education) [hereinafter Facilities Task Force].

75. *Id.*

ity of providing "alternative funding mechanisms"[76] to meet capital outlay needs. One of these alternative mechanisms, and the first goal addressed by the Task Force, was the "maximizing of all existing resources"[77] as a means of reducing capital outlay needs rather than simply determining a method for funding new school construction. In *St. Johns County*, there was no indication that the Florida Supreme Court reviewed this study or any study emphasizing a reduction in capital outlay needs. In contrast, there is a methodology study which addresses a singular means for responding to population growth through mathematical calculations of student population and the required facility square footage to meet these student needs.[78] The court should not be attempting to determine that impact fees are acceptable methods of "provid[ing] the *capacity* to serve the educational needs of . . . [the] dwelling units,"[79] without first determining whether the municipality attempted to maximize the potential of their present facilities.[80]

Whether or not St. Johns County has effectively attempted to maximize facility use should become a factor in determining the validity of the ordinance. Paralleling the logic used by the Florida Supreme Court in rejecting the Homebuilder's contention that this impact fee is nothing more than a tax, is the argument rejecting the imposition of impact fees to resolve the need for "units of new residential development"[81] as "too simplistic."[82] The court should balance the ability of alternative methods for funding capital outlay projects and not simply alternative methods of funding these projects.[83]

Equally important to the logic of the Florida Supreme Court's decision in approving this ordinance[84] is that the fee is charged to the

---

76. *Id.* (letter from Chairman, D. Burke Kibler, III of the Task Force to the Commissioner of Education).

77. *Id.* at 12.

78. Methodology Study, *supra* note 55, at 20-24.

79. *St. Johns County*, 583 So. 2d at 638-39 (emphasis added).

80. Facilities Task Force, *supra* note 74, at 12-14.

81. *Id.*

82. *Id.* at 3.

83. The Facilities Task Force met in 1989 to research the occurring school funding crisis. The Task Force was organized to recommend funding alternatives for public education capital outlay needs. *See* Facilities Task Force, *supra* note 74. One of the alternatives recommended to the Commissioner of Education was to consider maximizing the potential use of the present facilities, an alternative that should have been addressed by the court. *Id.*

84. *St. Johns County*, 583 So. 2d at 642 (with the exception of section 7(B), and then not unless all municipalities have entered into interlocal agreements, no fee can be

developer and not the homeowner or facility user.[85] The county contends that the homeowner is not economically affected because the housing market sets the price of the homes.[86] Alternatively, if the impact fee is passed on to the homeowner the ordinance could be deemed a user fee, and therefore violative of the constitutional mandate for "free public schools."[87] As a result, the court recognized the proposed concerns that the ordinance resembles a user fee,[88] and considered the severance of section 7(B) to cure the constitutional defect.

Section 7(B) threatened the validity of the ordinance, because it enabled the impact fee to be directed at the homes of potential users of the school facility, and not charged indirectly to the units within the development as a whole.[89] Severance of section 7(B) would also effect the intended purpose of this ordinance: shifting the cost of newly created needs to those who created the needs; namely, the developers. Although the county's position is that "a fair reading of Section seven (B) . . . does not provide for the kind of case by case exemption pointed to by the Fifth District Court,"[90] the Florida Supreme Court viewed this section as exempting those who could show that they will not impact school facilities, and therefore, required severance of the section.[91]

---

charged).

85. *Cf.* St. Johns County, Fla., Ordinance 87-60 § 11(B) (Oct. 20, 1987) (the ordinance states that if the funds collected are not expended for school facility construction, they will be returned to the present landowner). This statement strengthens the argument that the impact fee has been passed to the landowner.

86. The petitioners' initial brief in this case states that "logic, common sense and practical economics suggest that if impact fees are passed through to anyone by a developer, the likely "pass-throughee" will be the raw land owner . . . ." Petitioners' Brief, *supra* note 6, at 15 n.13.

87. Respondents' Brief, *supra* note 70, at 12 n.10 (stating from the record that "empirical studies conclude that impact fees are ultimately paid by the home buyers.").

88. *St. Johns County*, 583 So. 2d at 640. "[S]even (B) permits households that do not contain public school children to avoid paying the fee. This means that the impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, *thereby colliding with the constitutional requirement for free public schools.*" *Id.* (emphasis added).

89. State *ex rel.* Clark v. Henderson, 188 So. 351, 352 (1939). "The Constitution establishes a fundamental policy of making the *populace as a whole* bear the expense of an educational system which directly and primarily benefits the *populace as a whole.*" Respondents' Brief, *supra* note 70, at 14 (emphasis added).

90. Petitioners' Brief, *supra* note 6, at 19.

91. St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 640 (Fla.

Severance of section 7(B) from the ordinance resulted in the Florida Supreme Court's perception that "[w]e believe the ordinance, absent section seven (B), constitutes a workable scheme within the legislative intent."[92] However, in footnote six, which states "[w]hile not necessary to the validity of the ordinance, we should not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside,"[93] the court demonstrated that it was not sure of the definition of this "workable scheme." The court's logic used to find section 7(B) unconstitutional should have also worked to conclude that the court's position on adult facilities was objectionable, and therefore unconstitutional. An appropriate finding would be that, because the entire county would benefit from an educated community, the county as a whole should generate the required revenue.

It is understandable that the court feels a homeowner who will never impact the educational system should not be required to pay the educational facility impact fee.[94] However, this is contrary to the court's previous position which rejected the Homebuilders' argument "that because many of the new residents will have no impact on the public school system, the impact fee is nothing more than a tax insofar as those residences are concerned."[95] Covenants and land use restrictions placed on the residency of school aged children should not affect the fee[96] under the court's theory of the case, because the fee is directed at the developer, not the homeowner. Consequently, footnote six addresses a single group who would be offended by this ordinance,[97] and as a result, is destructive to the court's logic that impact fees are

---

1991).

92. *Id.* at 640.

93. *Id.* at 640 n.6.

94. An inference drawn from footnote six is that because of land use restrictions, there can be no minor residents and therefore there will be no impact on the public educational system. *Id.*

95. *Id.* at 638; *see, e.g.*, Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. 4th Dist. Ct. App. 1983) (where the court dealt with an amount and use of funds which "smacked more of revenue raising which is descriptive of a tax."); *See generally* Juergensmeyer & Blake, *supra* note 4, at 423-24 (revenue raised for the expansion of municipal facilities or services is usually classified as a tax).

96. *See* McLain Western #1 v. County of San Diego, 194 Cal. Rptr. 594 (Ct. App. 1983) (where the court said it is fair to assess developers of retirement communities).

97. *St. Johns County*, 583 So. 2d at 640 n.6 (retirement home purchasers).

not user fees.

The Florida Supreme Court's logic becomes conflicting where, in one discussion the developer is acknowledged as the only entity being effected by the impact fee,[98] and then in another argument the homeowner is acknowledged as being effected.[99] A major premise underlying the claim that only the developer is effected, is the theory that the price of a home is determined by the market, with no affect by impact fees. This theory conflicts with the language of the ordinance which provides for the "impact fee" to be refunded to the current landowner immediately after six years[100] if the funds have not been used for new facility construction.[101] Consequently, the ordinance indicates that the landowner, and possibly the homeowner, is the fee-payer.[102] The potential abrogation of constitutional rights in *St. Johns County* requires the court to redefine the ordinance's general meaning of "fee-payer."[103]

Section five of the St. Johns County ordinance illustrates a rela-

---

98. The impact fee is paid by the developer at the permit stage, which is designed to "provide the capacity to serve the educational needs of all . . . units." *Id.* at 638-39.

99. Acknowledging that a homeowner is affected by the imposition of the impact fee is expressed with disapproval in the court's discussion over the validity of section 7(B), *id.* at 640, and again in footnote six with the non-objection to an exemption provision for adult communities, *id.* at 640 n.6.

100. St. Johns County, Fla., Ordinance 87-60 § 11(B) (Oct. 20, 1987).

101. "Any refunds not expended . . . following six (6) years from the date the educational facilities impact fee was paid shall, upon application from the then *current landowner*, be returned to such *landowner* with interest at the rate of six percent (6%) per annum . . . ." *Id.* (emphasis added). Returning these unused funds to the current landowner implies an understanding that the educational impact fees were indirectly paid by the current landowner. This theory runs contrary to the logic expressed by the county and that of Justice Sharp (dissenting), that a "way must be found to constitutionally require those who wish to expand Florida's residential facilities *[developer]* to shoulder a fair share of the resulting increase in costs of schools." Petitioners' Brief, *supra* note 6, at 43 (citing *St. Johns County*, 559 So. 2d at 366 (Sharp, J., dissenting)) (emphasis and modification in original).

In addition, section 12(A)(1), Exemptions and Credits of the Ordinance, states that exemptions for expansion of existing buildings *only* occurs "where *no* additional public school enrollment will be produced over and above that produced by the existing use." St. Johns County, Fla., Ordinance 87-60 §§ 12(2)—(4) (Oct. 20 1987) (emphasis added). Section 12(A)(1) seems to address the logic that the ordinance is intended to be addressed *not* at developers, but at those units which will be intended *users* or makers of the need for new service increases.

102. However, the developer is not excluded from being the fee-payer at the end of six years if the land is not sold.

103. St. Johns County, Fla., Ordinance § 5(A) (Oct. 20, 1987).

tionship between a development activity and the fee-payer, in particular, section 5(A) makes reference to "a land development activity which may reasonably be expected to place students in the public schools."[104] This is further defined in section 5(D) as "any change in the use of any structure that will result in additional students in the public schools of St. Johns County."[105] The implication is that a homeowner remodeling his existing home will be charged this fee *if* additional public school students will result. This example shows that it is possible that: 1) the fee-payer is the homeowner, and 2) the impact fee is related to the attendance of additional students[106] and therefore, the fee would be paid *only* "by those households [where remodelling would produce additional] . . . public school children."[107] According to the court's position, these elements would have "the effect of converting the educational facilities impact fee into a user fee . . . ."[108] As such, this educational impact fee is violative of the constitutional mandate for free public schools and beyond the county's power to enact land use regulations, as provided by the Florida Legislature.[109]

The Florida Legislature has authorized the implementation of "comprehensive planning programs to guide and control future development."[110] Pursuant to the Local Government Comprehensive Planning and Land Development Act ("Growth Management Act"),[111] the Florida Supreme Court has indicated that the legislative intent is to "facilitat[e] the adequate and efficient provision of schools," in particular the county's involvement in financing.[112] Granted, the Growth Management Act defines its intent as "encourag[ing] the most appropriate use of . . . resources, consistent with the public interest . . . ."[113] This definition is an example of the legislature's awareness of the need for

---

104. *Id.*

105. *Id.*, § 5(D).

106. *Cf. St. Johns County*, 583 So. 2d at 639.

107. *Id.* at 640 (emphasis added) (the term "additional" was added to the quote by this author to represent the particular example; however, it does not detract from the court's view that if a fee is directed at the user it will be violative of the constitutional mandate for free public schools).

108. *Id.*

109. FLA. STAT. § 163.3161 (1989).

110. *Id.*, § 163.3161(2).

111. *Id.*, § 163.3161.

112. *St. Johns County*, 583 So. 2d at 642 (citing FLA. STAT. § 236.012(4) (1989)).

113. FLA. STAT. § 163.3161(3).

maximizing the capacity of the present school facilities. Therefore, the Florida Supreme Court should examine other methods of "increasing school facility capacity" which would also address Justice Sharp's view that "this state [would face] potential fiscal and social catastrophe . . ." if impact fees for schools were found unconstitutional.[114] The problem facing the court in determining the best alternative to the imposition of impact fees is that the dual rational nexus test does not require this examination by the court.

The Florida Supreme Court in *St. Johns County* cited the elements of the dual rational nexus test as: 1) "a reasonable connection between the need for additional schools and the growth in population that will accompany new development,"[115] and 2) "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision."[116] Although the court stated that the ordinance met the first prong of the dual rational nexus test, because "the fee [was] designed to provide the capacity to serve the educational needs of all . . . dwelling units [built],"[117] the ordinance failed the second prong, because "there was no restriction on the use of the funds to ensure they [would] be spent to benefit those who have paid the fee."[118] The dual rational nexus test lacked the ability to insure that "recommended ways to maximize utilization of existing facilities"[119] has occurred. Furthermore, the inclusion of a "less intrusive alternative means" component, established in the needs-nexus analysis, would perform this function and is the appropriate test for the validation of educational impact fees.

IV. Analyzing Ordinance Validity

A. *Reasonable Relationship to Dual Rational Nexus Tests*

The Third District Court of Appeal in *Wald Corp. v. Metropolitan Dade County*[120] analyzed the acceptability of two previously ap-

114. St. Johns County v. Northeast Fla. Builders Ass'n, 559 So. 2d 363, 364 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (Fla. 1991) (Sharp, J., dissenting).

115. *St. Johns County*, 583 So. 2d at 638.

116. *Id.* at 637.

117. *Id.* at 638-39.

118. *Id.* at 639.

119. Facilities Task Force, *supra* note 74, at 1.

120. Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 3d Dist.

plied tests for determining the constitutional validity of subdivision exactions. These were the "reasonable relationship" and "specifically and uniquely attributable" tests.[121] The "reasonable relationship" test states that the subdivision exaction requirement be "reasonably related to the needs of the municipality;" however, the "specifically and uniquely attributable" test further narrows this requirement to one being "specifically and uniquely attributable to the subdivider's activity."[122] The Third District Court of Appeal outlined the weaknesses of both tests.[123]

These tests interchange the burden of proving the nexus between the new development and the needs created among the developer and the municipality. The inadequacies of these tests originate from their inherent inflexibility. While the reasonable relationship test affords municipalities almost unchecked powers to impose fees, the "specifically and uniquely attributable" test would require verification that the development is the single reason for the shortage in school facility capacity, and therefore, unreasonable burdening of the municipality.[124]

The court in *Wald* was confronted with an ordinance which conditioned the approval of future development plans on the dedication of land to be used for a canal system.[125] Although the Third District Court of Appeal stated that this subdivision requirement would be valid under either the "reasonable relationship" test or "specifically and uniquely attributable" test,[126] the court, in a well prepared evaluation of these two tests, determined that a new "rational nexus approach provides a more feasible basis for testing subdivision dedication requirements . . . ."[127] One reason the court found this analysis attractive was because it "balanced the prospective needs of the community and the property rights of the developer [and] . . . treated the business of subdividing as a profit-making enterprise . . . ."[128]

Likewise, the Fourth District Court of Appeal in *Hollywood, Inc.*

Ct. App. 1976).

121. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961) (specifically and uniquely attributable test); Ayres v. City Council of Los Angeles, 207 P.2d 1, 8-9 (Cal. 1949) (reasonable relationship test).

122. *Wald*, 338 So. 2d at 866.

123. *Id.*

124. *Id.* at 866-67.

125. *Id.* at 864.

126. *Id.* at 865.

127. *Wald*, 338 So. 2d at 868.

128. *Id.*

v. Broward County,[129] in deciding the constitutionality of an ordinance effecting the county park system, advanced the present form of the dual rational nexus test applied in *St. Johns County*.[130] In *Hollywood*, the court addressed a subdivider's challenge to an ordinance requiring either the dedication of land, or the payment of a fee in lieu of land dedication for a county park program.[131] The court held that the "exactions are shown to offset, not exceed, reasonable needs sufficiently attributable to the new subdivision residents . . . [and that the] capital assets will sufficiently benefit those new residents.[132] However, there are important factual distinctions between the land dedication exaction in *Wald*, and the monetary educational impact fee addressed by the court in *St. Johns County*.[133] The differences between subdivision dedications and impact fees are important. Two reasons need to be explored: 1) land is unique, and 2) dedicating land draws a "proper distinction[] between the individual property-holder and subdivider."[134]

First, the land in question might be so unique that even the alternatives to land dedication offered by the ordinance in *Hollywood*, payment of a fee in lieu of the dedication,[135] would not be acceptable. For example, the land dedicated for new school facility construction should be central to its related community, enabling students to attend school without traveling extensive distances. Second, the benefits of property subdivision accruing to a subdivider may require the dedication of land to maintain a balance between the community and subdivider, differentiating between the treatment of individual land owners and profit-making enterprises.[136] The test used by a court in determining the validity of impact fees should be flexible enough to allow the municipality room to provide for its growing community; however, it should be strict enough to insure that the proper method is chosen. In order to provide for the flexibility required, the dual rational nexus test must be further developed.

Further development of this test requires a determination as to whether the ordinance is classified as a "development exaction" or

---

129. Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th Dist Ct. App. 1983).
130. *St. Johns County*, 583 So.2d at 637.
131. *Hollywood*, 431 So. 2d at 610.
132. *Id.* at 614.
133. *St. Johns County*, 583 So. 2d at 637.
134. *Wald Corp.*, 338 So. 2d at 868.
135. *Hollywood*, 431 So. 2d at 607.
136. *Id.* at 610.

"user impact fee."[137] This classification methodology supports a balance between the equities of the developer and the municipality, by incorporating and evaluating the type, size and cost of the construction proposed. The effect of the classification is important to the obligations and standards applied to the parties by this proposed "needs-nexus analysis."[138] The definitions for subdivision exactions and user impact fees in the needs-nexus analysis are the following:

> 1. *Subdivision Exaction*—Traditional construction, dedication, or in-lieu-fee payment for site-specific needs imposed at the time of subdivision. These improvements are usually categorized as being "minor" in scope and cost, and are typically provided on-site. Examples include subdivision streets, sidewalks, trails, utility easements, and open space.
> 2. *User Impact Fee*—More recent device to fund major, off-site infrastructure expansion imposed at the building permit stage. Examples include expansion or improvement of sewage treatment facilities, landfills, primary roadways, *schools*, and active recreational parks.[139]

The definition suggested for a "user impact fee" conforms to the situation found in *St. Johns County*. Although the court there did not distinguish between subdivision exactions and user impact fees when evaluating the application of the dual rational nexus test, it is an essential component for determining the validity of the ordinance.[140] The Florida Supreme Court should re-evaluate the application of the dual rational nexus test in the area of education because of the significant substantive differences between the definitions of user impact fees and subdivision exactions. It is this conflict in definition substance which highlights

---

137. The Petitioners' initial brief defines the important distinctions between "user" fees and "development exactions" as follows: "A user fee assumes that capacity is available and imposes a fee for using the capacity. A development exaction is predicated on the fact that capacity is not available (Section 163.3202(2)(g), Fla. Stat. (1989)) or the developer should be given the alternative of financing an increase in facilities capacity." Petitioners' Brief, *supra* note 6, at 18.

138. Authors Delaney, Gordon and Hess, are concerned about the inability of courts to distinguish clearly between the tests available. *See* Delaney et al., *supra* note 28. The needs-nexus analysis is a test unifying the "reasonable relationship," "specially and uniquely attributable," and "rational nexus" tests for determining the validity of impact fees. *Id.*

139. *Id.* at 139 (emphasis added).

140. *Id.* at 141.

the need for test reform.

B. *The Need for Test Reform: "Needs-Nexus Analysis"*

The "needs-nexus analysis"[141] is the appropriate test for analyzing the public educational impact fee proposed by the St. Johns County Ordinance. Because impact fees which focus on educational facilities reflect complications unique to themselves,[142] the test applied by the court should reflect an understanding of these problems.[143] The "need-nexus analysis" was designed to examine the validity of both "subdivision exactions" and "user impact fees."[144] This test categorizes new school facility construction as a user impact fee because of the large estimated project size, and the fact that the fee is exacted at the permit stage, rather than at subdivision.[145] However, since the need for in-

---

141. *See generally* Delaney et al., *supra* note 28.

142. FLA. CONST. art. IX, § 1 (Constitutional mandate for "uniform system of free public schools").

143. *See* Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 992 n.3 (1989) ("Many states have resolved these conflicts by adopting some *variation* of the rational nexus rule . . . .") (emphasis added).

In addition, although the United States Supreme Court has not expanded the definition of fundamental rights beyond that which is explicitly or implicitly guaranteed by the Constitution, where the Court in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), held that the differences in expenditures per student from local property tax funding is constitutional where the procedure is rationally related to a legitimate state interest, it has considered that issues of public education to require more than the mere rationality review applied to social welfare interests. *See* Plyer v. Doe, 457 U.S. 202, 221 (1982). In *Plyer*, the level of scrutiny of a Texas statute denying the funding for public education of illegal aliens was elevated to protect against the denial of an education:

> Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id.

Because the Florida Supreme Court has recognized a distinction between impact fees for sewer and water facility connections and education, *St. Johns County*, 583 So. 2d at 638, the court should reevaluate the applicability of the dual rational nexus test.

144. Delaney et al., *supra* note 28, at 139.

145. *Id.* (The Educational Impact Fee proposed in St. Johns County contains elements of both the subdivision exaction determination where the need is "attributable to [the] subdivision," and also resembles the definition of a user impact fee offered by

creased new school facilities has been created by the subdivision for the subdivision, as opposed to the creation of an area wide need, the St. Johns County ordinance also parallels the needs-nexus test's definition of a subdivision exaction.[146] Therefore, further development of the dual rational nexus test should compile elements from tests considering both categories: subdivision exactions and user impact fees.

The needs-nexus analysis for subdivision exactions is similar to the dual rational nexus test applied by the supreme court in *St. Johns County*.[147] Further development of the dual rational nexus test would require three steps. First, determine whether the need for additional school facilities is generated by the growth in population created by the new development. Second, ascertain whether there is a reasonable connection between the fee imposed and the service rendered to the development. Third, determine if there are any "less intrusive means available"[148] by closely examining legislative intent.

The policy presented by this additional third element is to require the exploration of *all* possible methods of financing such large infrastructure projects, as well as alternative methods for reducing the need for additional new school facilities.[149] The municipality should not implement a revenue raising tool merely because it is unlikely to raise outrage by municipal residents. Impact fees are directed at a silent

---

the needs-nexus test.).

146. *Id.* at 158-59.

147. Although the court stated: "In essence, [we] approved the imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees," the court made no study of its own into the validity of the test. *St. Johns County*, 583 So. 2d at 637. The court articulated the requirements as: 1) the demonstration of a rational nexus between additional facility needs and the growth in population created by the new developments; and 2) a rational nexus between the "expenditure of funds collected and the benefits accruing to the subdivision." *Id. See generally* Delaney et al., *supra* note 28, at 152-53; Juergensmeyer & Blake, *supra* note 4, at 431-33.

148. Delaney et al., *supra* note 28, at 161 (examples for "less intrusive alternatives" are increasing the general tax rate or by the use of general obligation bonds). In addition, the Facilities Task Force addressed issues for maximizing present facilities, none of which are politically palatable decisions. *See* Facilities Task Force, *supra* note 74, at 12.

It is noted that the three elements defined for the needs-nexus test suggested by this Comment are a compilation of the components of the nexus prongs offered for both subdivision exactions and user impact fees with the burden of proof on the government. It would be the government's burden to show that less intrusive alternatives are not available. *See* Delaney et al., *supra* note 28, at 158-59.

149. Facilities Task Force, *supra* note 74.

constituency,[150] those not yet part of the local voting population,[151] and therefore, are politically aesthetic. The addition of the less intrusive alternative element would require the court to further scrutinize the previous elements as well as research the effectiveness, not only of the impact fee, but of alternative methods for financing or reducing the need for new school facilities.[152]

---

150. Delaney et al., *supra* note 28, at 161.

151. [O]wners of undeveloped land, developers, and consumers of new development are poorly represented minorities. Their votes are few; many of them have no vote at all, as they are not (or are not yet) residents of the [municipality]; their campaign contributions and lobbying efforts are ineffectual. The homeowning majority has every incentive to minimize its own tax burden by developing a source of municipal revenue, the burden of which falls on these groups.

Note, *supra* note 143, at 1007; *see also* Daniel W. Sweet & Lee P. Symons, *Pennsylvania's New Municipalities Planning Code: Policy, Politics, and Impact Fees*, 94 DICK. L. REV. 76, 91-2 (1989) stating:

> The political question most aptly formulated with respect to impact fees and related exactions is as follows: "It is easy to understand the genesis for this type of regulation. After all, elected officials would prefer to tax those who do not vote. But it is hard to justify this type of requirement as a matter of law. A decision by a municipal governing body to impose the cost of the new fire house on the new residents, via zoning regulations, is in effect a taxation decision." . . . The current Pennsylvania practice of monetary exactions is questionable, both as a matter of law and as a matter of public policy. These ad hoc deals possess tremendous potential for abuse and corruption. Impact fee legislation, which is based upon studies by planners employed by the municipalities that desire to enact the ordinances, threatens to subtly disguise nonuniform taxation.

(quoting 1 R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.17 (1981)).

In 1987, the California Newhall School District submitted a resolution for a "special tax" to fund capital outlay projects and which included the addition of school-impact fees. California Bldg. Indus. Ass'n v. Newhall School Dist., 253 Cal. Rptr. 497 (Ct. App. 1988). "Not surprisingly, the special taxes were overwhelmingly supported by *district voters not subject to the new exaction.*" Daniel J. Curtin Jr. & Michael P. Durkee, *'Special' Tax is Still a Tax*, 102 L.A. DAILY J. 5 (January 6, 1989) (emphasis added); *See, e.g.*, CAL. CONST. art. VIIIA (Proposition 13, passed June 6, 1978, requires a two-thirds voter approval on resolutions).

152. In examining the "less intrusive alternatives available," the authors of the need-nexus analysis offer the following questions to be considered by a court in their examination:

> -What is the amount of the fee and its likely impact upon the ultimate consumer when passed through by the developer?
>
> . . . .
>
> -How healthy is the municipality's assessable base? Is it growing or

V. CONCLUSION

The Florida Supreme Court contends that the legislature did not

---

eroding?

-Is the municipality's tax rate low in comparison to similar situated political subdivisions?

-What is the municipality's bond rating? Will increased taxes or borrowing to fund public improvements jeopardize it?

-Has the municipality's current capital improvements program (CIP) kept pace with previous programs? How does the current CIP compare to its predecessors in relation to the current size of the municipality and growth trends?

-Is the municipality's existing housing stock sufficiently diverse and inclusionary to accommodate a variety of income groups including low and moderate-income families?

-Is the fee, in reality, a double tax on the consumer? In other words, is the new-home purchaser, who, like existing residents, pays deductible property taxes for services, and also must pay a nondeductible impact fee for the same service (though the increased price of the home), essentially paying twice?

Delaney et al., *supra* note 28, at 161-62 (quoting BUILDER AND ASS'N SERVICES DIV., NATIONAL ASS'N OF HOME BUILDERS, IMPACT FEES: A DEVELOPER'S MANUAL at 4)) (emphasis added).

An additional question posed by these authors is:

-Is the affected property being credited for providing common facilities that the municipality has provided without charge to other properties in the service area?

See Delaney et al., *supra* note 28, at 162 (quoting Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903-05 (Utah 1981)).

In addition to these questions suggested by Delaney, Gordon and Hess, the court should consider these additional questions:

-What was the Education Estimating Conference's forecasts (for a period of 10 years prior to 1989) on "student enrollments, fixed capital outlay needs, and Florida Education Finance Program formula needs," as the conference determined was needed for the state planning and budgeting system?

See, e.g., Facilities Task Force, *supra* note 74 (where a facilities task force was appointed by the Commissioner of Education in 1989 to determine the "projected capital outlay needs of the State of Florida to the year 2000."); *see* FLA. STAT. §§ 216.134(1), .136(4)(a) (1989 & Supp. 1990).

-Was a separate account to be known as the "*Special Facility Construction Account*," established as part of the Public Education Capital Outlay and Debt Service Trust Fund to "*provide necessary construction funds to school districts which have urgent construction needs but which lack sufficient resources at present*, and cannot reasonably anticipate sufficient resources within the period of the next 3 years, for these purposes from cur-

intend to limit the ability of municipalities to meet the needs of its growing community. However, this ability is not without clarification. The supreme court, in the subsequent clarification of their opinion, should have considered the constitutional validity of section 7(A)(5), section 5(D) and the context of footnote six. Inclusion of a less intrusive means component to the dual rational nexus test will assist the court in examining acceptable alternatives prior to the levying of impact fees.

It seems that all logical paths for the understanding of infrastructure fees define them as either a tax or user fee, or at least the court has not outwardly suggested another. In the area of education, an analogy to either of these definitions is fatal to the constitutional validity of a related impact fee. The distinction between a fee levied for service use, and the fee levied to increase capacity to serve lies only in semantics. The St. Johns County Educational Impact Fee closely resembles a user fee for all the reasons presented in this comment, and therefore, it violates the constitutional mandate for free public schools. Fees for educational facilities are far different from other forms of on or off site facility improvements. Within the field of education, we must consider individual rights founded upon the Florida Constitution and apply a higher standard of analysis.

Concomitant to the contention that the St. Johns County Educational Impact Fee is nothing more than a user fee, this comment contends that the dual rational nexus test is inappropriate in analyzing the constitutional validity of educational impact fees. A requirement for determining whether there are any "less intrusive alternatives" should be preeminent in determining the validity of ordinances which either threaten a constitutional imperative, or are directed at a silent constitu-

---

rently authorized sources of capital revenue?"
FLA. STAT. § 235.435(2)(a) (1989) (emphasis added).
And finally, what is the current status and availability of this account?

ency, circumventing the legislature[153] and the normal political process.[154]

Joseph Livio Parisi

153. (e) The Legislature finds and declares that the subject of the financing of school facilities with development fees is a matter of statewide concern. For this reason the legislature hereby occupies the subject matter of mandatory development fees and other development requirements for school facilities finance to the exclusion of all local measures on the subject.

CAL. GOV. CODE § 65995(e) (1991).

154. *See* Note, *supra* note 143, at 1006-08.